87-1587

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

THOMAS K. YAMEEN,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Question Presented.

Where, under state law, a motorist accused of operating under the influence of intoxicating liquor was afforded a choice of consenting to or refusing a breath test, and where, unlike the motorist in *South Dakota* v. *Neville*, he took the test, was it fundamentally unfair under the due process clause of the Fourteenth Amendment to use his choice to take the test, apart from his test result, as evidence of guilt?

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No. - .

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Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Petitioner, Thomas K. Yameen, respectfully prays that a writ of certiorari be issued to review the decision of the Massachusetts Supreme Judicial Court dated December 17, 1987, and affirmed by denial of Petition for Rehearing dated January 25, 1988.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 401 Mass. 331, 516 N.E.2d 1149 (1987) and is reproduced as Appendix A to this Petition at 1a to 7a, *infra*. The Petition for Rehearing is reproduced as Appendix B at 8a to 22a, and the denial thereof is reproduced as Appendix C at 23a.

Jurisdiction.

On December 17, 1987, the Supreme Judicial Court affirmed petitioner's conviction for operating a motor vehicle under the influence of intoxicating liquor. A petition for rehearing, which was timely filed after an extension granted by the court, was denied on January 25, 1988. See Appendices B and C at 8a and 23a, respectively. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930). See p. 9, *infra*.

Constitutional Provision Involved.

This case involves the portion of the Fourteenth Amendment to the Constitution which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Constitution, Amendment XIV, Sec. 1.

Statement of the Case.

On the evening of March 12, 1986, petitioner Thomas K. Yameen was stopped by a police officer of the Town of North Andover, Massachusetts for a moving violation. After further investigation and observations, the officer concluded that petitioner was operating a motor vehicle under the influence of intoxicating liquor,[1] and arrested him. At the police station, petitioner was advised that he had a right to a breath test and, according to the officer, he "elected to take the intoxilyzer." (Trial Transcript Vol. II, page 55.) The reading on the test was .16.

At trial, petitioner vigorously contested the charge. In addition to his own testimony that he was not under the influence that evening, the bartender who served him testified that he thought petitioner was sober when he last saw him, which was a short time before the arrest.

A chemist, qualified by the court as an expert in infrared breath measurement, testified concerning the numerous potential sources of error in the Intoxilyzer 5000 and further stated that he would have no confidence in the test reading resulting from the procedures that were employed with that machine in petitioner's case. Finally, in answer to a hypothetical question incorporating facts in evidence concerning the number and timing of drinks petitioner consumed, the chemist estimated that petitioner's blood alcohol content at the time of his breath test was .07, not .16.

On cross-examination of petitioner, the prosecutor (Mr. Hayden) attempted to place into evidence the consequences of breath test refusal, and the following exchange occurred:

> MR. HAYDEN: And when he gave you the rights about that concerning the test, he also told you, that

[1] Massachusetts General Laws (M.G.L.) c. 90, § 24(1)(a)(1).

if you didn't take it, you were going to lose your license for 90 days?

MR. MACDONALD: Objection, Your Honor. Motion to strike.

THE COURT: Well, may I see counsel? (Bench conference) Your objection?

MR. MACDONALD: I think it's irrelevant whether or not he was going to lose his license. In fact, he said he was offered the test, and he took it.

THE COURT: I disagree. Objection is overruled. (End of bench conference) Repeat the question, counsel.

MR. HAYDEN: Did Lieutenant Lynch tell you, that if you didn't take that breathalyzer test, you were going to lose your license for 90 days, correct?

DEFENDANT: Yes, sir.

(Trial Transcript Vol. II, pages 135-136.)

The Supreme Judicial Court, in affirming petitioner's conviction, held that the prosecutor's question was relevant "to show that the defendant's willingness to take the breathalyzer test was not due to his consciousness of innocence." (App. A at 7a.) Although recognizing petitioner's contention that allowing the prosecution to inquire into this matter created an "untenable dilemma" for a motorist arrested for driving under the influence, the court resolved this question of first impression against petitioner because his protestations of innocence and decision to take the test "*could have*" raised an inference of consciousness of innocence before the jury (App. A at 7a, n.4) (emphasis added).

Reasons for Granting the Writ.

I. The Supreme Judicial Court's Holding Offends Notions of Fundamental Fairness under the Fourteenth Amendment.

Driving under the influence (of liquor or narcotics) is the most frequently committed criminal offense in the United States, with an estimated 1.8 million arrests in 1986.[2] The tragedy caused by the drunk driver is well documented and the aggressive efforts of state governments and courts to combat the problem are far reaching, and multi-faceted. But many of these procedures and laws have undergone constitutional scrutiny. One effective procedure to obtain evidence against the drunk driver is the "implied consent" law. At the time of petitioner's arrest, the Massachusetts statute,[3] which was upheld by this Court in *Mackey* v. *Montrym*, 443 U.S. 1 (1979), provided that a motorist who refused to submit to a test of his breath lose his license to operate for ninety days. State law further provides that a motorist's refusal to submit to such test is not admissible against him in any criminal or civil proceeding.[4]

A Massachusetts motorist does not have a statutory right to a police administered breath test, but rather has a right to consent to such a test. *Commonwealth* v. *Alano*, 388 Mass. 871, 874, 448 N.E.2d 1122, 1125 (1983). In this case the petitioner, in the words of the breathalyzer operator, "elected" to exercise that right and scored a reading of .16. Clearly, Massachusetts wants its motorists to take such a test because then it will have "reliable and relevant evidence for use in sub-

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[2] U.S. Dept. of Justice, Crime in the United States, 1986.

[3] M.G.L. c. 90, § 24(1)(f).

[4] M.G.L. c. 90, § 24(1)(e).

sequent criminal proceedings," *Mackey* v. *Montrym, supra*, 443 U.S. at 18, and may reap the benefit of the statutory presumption[5] should the reading be .10 or greater. That reading alone can carry a case to the jury. *Commonwealth* v. *Moreira*, 385 Mass. 792, 795, 434 N.E.2d 196, 199 (1982).

Once a motorist has made the choice the state wants him to make, it is fundamentally unfair and a denial of due process under the Fourteenth Amendment to then penalize him for that choice. Petitioner's contentions at trial that he was sober and that he therefore chose to take the breath test, were styled by the Supreme Judicial Court as "consciousness of innocence." Citing one decision in a footnote (App. A at 7a, n.4), the court held that those contentions could be rebutted by evidence of the breath test refusal penalty, i.e., 90 day loss of license. The court erroneously assumed that the threatened penalty prompts the motorist to take the test when, in reality, that motivation exists "if drivers are informed not only of this sanction for a refusal *but also realize that cooperation may conclude the entire case in their favor*." *Mackey* v. *Montrym*, *supra*, 443 U.S. at 26 (Stewart, Brennan, Marshall, and Stevens, JJ., dissenting) (emphasis added).

The court's holding truly places an arrested motorist in an untenable dilemma: refuse the test and suffer a loss of license; take the test and be subject to the suggestion at trial that the threatened loss of license, not sobriety, was the motivating factor. The government, in effect, has it both ways.

This Court ruled a similar dilemma to be unconstitutional in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). As in *Doyle*, petitioner was offered a lawful choice; his choice to take the breath test was equivalent to Doyle's choice to remain silent; and that choice had the effect, whether it was intended or not, of avoiding a loss of license. And although petitioner's right to consent

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[5] M.G.L. c. 90, § 24(1)(e).

to or refuse a breath test is not one of constitutional dimension, *South Dakota* v. *Neville*, 459 U.S. 553, 565 (1983), the imbalance in the delivery of warnings to him, i.e., the absence of any mention of adverse consequences from choosing to take the test, creates the fundamental unfairness when his *choice* to take the test is used as evidence of guilt. In contrast is this Court's holding in *Neville, supra*, which stated:

> Unlike the situation in *Doyle*, we do not think it fundamentally unfair for South Dakota to use the *refusal* to take the test as evidence of guilt, even though respondent was not specifically warned that his *refusal* could be used against him at trial.

459 U.S. at 565 (emphasis added).

In explaining to the Massachusetts motorist his two options, the government has thus implicitly assured the motorist who takes the breath test that his avoidance of license loss will not be used against him. See *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982).

Not only did the Supreme Judicial Court's reasoning create the constitutional violation, it rendered it more egregious than in *Doyle*, because unlike Doyle, petitioner made the choice the government wanted him to make *and* provided them with inculpatory evidence.

The applicability of *Doyle* to petitioner's situation can best be illustrated by a paraphrase of Justice White's concurring opinion in *United States* v. *Hale*, 422 U.S. 171, 182-183 (1975):

> [W]hen a person under arrest is informed, as [Chapter 90] requires, that he [has a right to consent to a breath

> test and will lose his license for 90 days if he does not], . . . it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's avoidance of the penalty for refusing the test] . . . and to insist that because he [chose to take the test], . . . as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely [Yameen] was not informed here that his [avoidance of license loss], as well as his [test result], could be used against him at trial. Indeed, anyone would reasonably conclude from [what he was told] . . . that this would not be the case.

(Citations omitted.)

In allowing petitioner's claim of innocence to be rebutted by evidence of a penalty that was automatically avoided as a consequence of his choice to take the test, the court bypassed basic notions of fundamental fairness.

II. The Supreme Judicial Court Considered and Decided Petitioner's Federal Question Which Was Raised at the First Opportunity.

The Supreme Judicial Court ruled as a matter of state evidentiary law that the prosecutor's question, which is at issue, was relevant. The only authority cited lending support to its holding was in footnote 4 of the opinion (App. A at 7a). *Commonwealth* v. *Preziosi*, 399 Mass. 748, 506 N.E.2d 887 (1987), however, involved a situation where defense counsel *argued* defendant's consciousness of innocence to the jury, and the prosecutor properly rebutted that suggestion. Petitioner's counsel did not

so argue in the instant case. From a question asked of the assistant district attorney at oral argument, it appeared that the court appreciated the impropriety of rebutting evidence that had not yet been introduced.[6]

The issue raised by petitioner was one of first impression for the Supreme Judicial Court and it is submitted that a critical examination of other cases concerning relevancy would not have foreshadowed the court's holding. Likewise there was no basis to expect that the court's logic and holding would transform a state evidentiary question into a constitutional issue, but by ruling against petitioner, that is in fact what happened. See *Commonwealth* v. *Trapp*, 396 Mass. 202, 207 n.4, 485 N.E.2d 162, 166 n.4 (1985) (hearsay evidence admitted under state evidentiary practice may raise issue of defendant's constitutional right to confrontation).

The federal question was therefore raised at the first opportunity, on the Petition for Rehearing (App. B at 8a), and was considered by the court (App. C at 23a). *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930).

In an attempt to further certify that the federal question had been raised and decided, petitioner requested a certificate (App. D at 24a) from the Supreme Judicial Court under the procedure approved in *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20, 22 (1974). Rather than deny such request, the court issued a certificate that the federal question was raised but "*not* considered" (App. E at 27a) (emphasis by the Court). That document contradicts their earlier decision (App. C at 23a), and because it is not in the required form, a certified copy has not been filed with the Clerk of this Court.

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[6] [JUSTICE NOLAN:] Well, do you think you have a right to rebut something that hasn't been raised, that wasn't even raised; kind of anticipatory, isn't it?

(Official tape recording of oral argument.)

In issuing that document, the Supreme Judicial Court has attempted to deprive this Court of jurisdiction of a meritorious federal question. It is somewhat ironic that, had petitioner done nothing, the original denial of the petition for rehearing would have sufficed to give this Court jurisdiction. Inasmuch as a state court certificate is not conclusive, *Honeyman* v. *Hanan*, 300 U.S. 14, 18-19 (1937), and because "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts," *Street* v. *New York*, 394 U.S. 576, 583 (1969), petitioner urges this Court to disregard the alleged certificate.

Conclusion.

For the foregoing reasons, petitioner requests that certiorari be granted.

Respectfully submitted,

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Appendix.

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COMMONWEALTH *vs.* THOMAS K. YAMEEN.

No. 4424.

Suffolk. Essex. November 2, 1987. — December 17, 1987.

Present: HENNESSEY, C.J., LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Motor Vehicle, Operating under the influence. *Moot Question*. *Practice, Criminal*, Examination of jurors. *Evidence*, Relevancy and materiality, Breathalyzer test.

Although the question of error in denying a criminal defendant's motion for a stay, pending appeal, of the revocation of his driver's license had become moot through the passage of time, this court reached the issue as one that was capable of repetition yet apt to evade review. [333]

A judge may, in his discretion, grant a stay of the automatic license revocation mandated by G. L. c. 90, § 24(1) (*b*), pending a defendant's appeal from his conviction of operating a motor vehicle while under the influence of intoxicating liquor. [333-335]

No error appeared in the trial of a complaint for operating a motor vehicle while under the influence of intoxicating liquor by the judge's denial of the defendant's motion to pose questions to prospective jurors in addition to those required by G. L. c. 234, § 28 [335], nor by the judge's declining to instruct the prospective jurors during the empanelment process on the concepts of reasonable doubt, burden of proof and presumption of innocence [335-336].

At the trial of a complaint for operating a motor vehicle while under the influence of intoxicating liquor, the judge properly submitted to the jury the issue of the accuracy of a breathalyzer test administered to the defendant. [336]

No error was created at the trial of a complaint for operating a motor vehicle while under the influence of intoxicating liquor for the judge's allowing the prosecution to suggest on cross-examination of the defendant that he took a breathalyzer test to avoid the loss of his driver's license for ninety days, under the provisions of G. L. c. 90, § 24 (1) (*f*), where defense counsel had raised the issue of the defendant's consciousness of innocence in his taking the test. [336-337]

COMPLAINT received and sworn to in the Lawrence Division of the District Court Department on March 13, 1986.

In the jury session of the Haverhill Division the case was tried before *William H. Sullivan*, J.

The Supreme Judicial Court granted a request for direct appellate review.

A proceeding seeking a stay of revocation of the defendant's motor vehicle operator's license was heard by *Abrams*, J., in the Supreme Judicial Court for the county of Suffolk.

Bruce T. Macdonald for the defendant.

David A. Grossbaum, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. The defendant was convicted by a jury of six in the District Court Department of operating a motor vehicle while under the influence of intoxicating liquor.[1] The judge imposed a fine and a surfine and ordered the defendant forthwith to surrender his driver's license, pursuant to the automatic revocation provisions of G. L. c. 90, § 24 (1) (*b*) (1986 ed.). The judge stayed the fines pending the defendant's appeal, but declined to stay the revocation of the defendant's license.

The defendant appealed his conviction to the Appeals Court and filed a motion in that court requesting a stay of the license revocation pending appeal. A single justice denied this motion. The defendant then sought review of this ruling by a single justice of this court under G. L. c. 211, § 3 (1986 ed.). Relief was denied. Thereupon the defendant filed an appeal from the order of the single justice to the full bench of the Supreme Judicial Court. We granted the defendant's application for direct appellate review and consolidated his appeals from his conviction and from the single justice's order declining to stay the revocation of his license.

On appeal of his conviction for operating under the influence, the defendant assigns as error certain actions of the trial judge which are discussed below. The defendant also contends that the single justices of the Appeals Court and of the Supreme Judicial Court erred in denying his motions for a stay of the revocation of his license.

[1] A second conviction for failure to use care when turning was not appealed.

1. *Motion for stay pending appeal.* At the outset, we note that the issue as to the stay is moot as regards the defendant, since the one-year revocation period has passed. However, both parties urge us to reach this issue as one that is capable of repetition, yet evading review. "[W]e have on occasion answered questions in moot cases where the issue was one of public importance, where it was fully argued on both sides, where the question was certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." *Lockhart* v. *Attorney Gen.*, 390 Mass. 780, 783 (1984), and cases cited. These considerations make resolution of the present issue desirable. Defendants convicted of operating under the influence will continue to appeal their convictions. Because the revocation period generally will be shorter than the period of time necessary to complete the appellate process, this issue is apt to evade review. See *First Nat'l Bank* v. *Haufler*, 377 Mass. 209, 211 (1979) ("An issue apt to evade review is one which tends to arise only in circumstances that create a substantial likelihood of mootness prior to completion of the appellate process").

The single justice of the Appeals Court believed that he lacked statutory or inherent power to grant the requested stay. It is not clear on what basis the single justice of the Supreme Judicial Court denied the defendant's request for a stay. She stated that it was "not clear" that she had such power, but it is just as likely that she declined to act because she determined in her discretion that a stay was not warranted. The Commonwealth contends that the power to stay a license revocation resides only in the Registrar of Motor Vehicles and not in the judiciary. The defendant, of course, disagrees.

The Commonwealth argues that Mass. R. Crim. P. 31, 378 Mass. 902-903 (1979), which authorizes stays of sentences pending appeal, applies only to sentences of imprisonment or fines and not to a driver's license revocation; that under G. L. c. 90, § 24 (1) (*b*), the courts specifically are prohibited from staying a license revocation pending appeal; and that the courts do not have inherent power to stay a license revocation absent

statutory authorization, much less in the face of a statutory interdiction of such stays.

We agree with the Commonwealth that Mass. R. Crim. P. 31 does not authorize a stay of a license revocation. By its terms, that rule applies only to sentences of imprisonment or fines. But we do not think that G. L. c. 90, § 24 (1) (b), specifically prohibits a court from staying a license revocation pending appeal. That statute says only that "no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or the right to operate." This language does not purport to divest the judiciary of the power to issue a *discretionary* stay of a license revocation pending appeal, but comports with the normal criminal law practice that entry of an appeal does not *automatically* operate to stay the execution of a sentence. See Mass. R. Crim. P. 31 (a) (where sentence of imprisonment imposed, "the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or a judge of the Supreme Judicial Court or the Appeals Court determines in his discretion that execution of said sentence shall be stayed pending the final determination of the appeal").

That the Legislature would purport to divest the judiciary of the power to grant a discretionary stay pending appeal in a driver's license revocation case is a proposition that we will not accept absent a clearer indication of legislative intent. To construe G. L. c. 90, § 24 (1) (*b*), as prohibiting a court from issuing a discretionary stay pending appeal would be inconsistent with the statutorily granted right of appeal from a conviction of operating under the influence, G. L. c. 211A, § 10 (1986 ed.). To allow a defendant to appeal his conviction yet mandate that his punishment could not be stayed while he did so would be to "pay lip service to the statutory provisions that establish the right for a licensee to appeal while eradicating any practical reason for taking the appeal. . . . A licensee whose license has been revoked or suspended immediately suffers the irreparable penalty of loss of [license] for which there is no practical compensation. This happens even if said licensee wins an appeal and a decision holding that the license was wrongfully revoked. The purpose and impetus for appeal-

ing[,] i.e., to prevent having an irrevocable and irreparable penalty imposed, is erased when the statute requires imposition of the penalty prior to and despite the outcome of the appeal. . . . The practical effect is to render the appeal a meaningless and merely ritualistic process." *Smothers* v. *Lewis*, 672 S.W.2d 62, 65 (Ky. 1984) (statute denying courts the power to stay liquor license revocation pending appeal violates Kentucky Constitution's mandate of separation of powers; courts have inherent powers to stay execution of sentence pending appeal). We therefore conclude that a judge in his discretion may stay a license revocation pending appeal.

2. *Motion for additional voir dire questions.* The defendant contends that the trial judge erred in denying his motion for questions to be posed to prospective jurors, and that this ruling deprived him of a meaningful opportunity to discover biases of the prospective jurors regarding the consumption of alcoholic beverages and the offense of operating a motor vehicle while under the influence of intoxicating liquor. He argues that the judge's denial of his motion prevented the defendant from intelligently exercising his peremptory challenges and challenges for cause. The judge asked the prospective jurors the questions required by G. L. c. 234, § 28 (1986 ed.). He declined to ask the defendant's additional questions, which sought to explore specific areas of possible juror bias, to explain certain areas of the law prior to the final charge, and to ensure that the jurors would follow the judge's statements of the law.

"The decision not to ask the further questions requested by the defendant[ ] was not error. Whether questions other than those required by statute and case law should be put to prospective jurors has been viewed historically as discretionary with the trial judge." *Commonwealth* v. *Horton*, 376 Mass. 380, 393 (1978), and cases cited. *Commonwealth* v. *Monahan*, 349 Mass. 139, 156 (1965), and cases cited. See *Commonwealth* v. *Rhoades*, 379 Mass. 810, 821 (1980) ("Questions not aimed at 'revealing racial bias or any similarly indurated and pervasive prejudice' are not constitutionally required," quoting *Commonwealth* v. *Bailey*, 370 Mass. 388, 399 [1976]), and cases cited.

Nor was there error in the judge's declining to instruct the prospective jurors as to the meaning of certain concepts included in the statutory questions.[2] The argument is that the prospective jurors could not respond intelligently to the questions for lack of understanding of the legal terms, and consequently the defendant could not effectively use his challenges. The defendant emphasizes that the judge should have defined the term "reasonable doubt" for the prospective jurors and inquired of them whether they would have difficulty accepting and applying this legal principle. The short answer to these contentions is that the Legislature did not mandate that such explication must occur as part of the empanelling process. Whether such preliminary instruction should be given rested in the discretion of the judge. See *Horton*, *supra* at 391. We add that the judge charged fully and correctly at the conclusion of the trial, and nothing appears in this record to indicate that the jury did not understand and apply the law correctly. *Rhoades*, *supra* at 822.

3. *Evidentiary rulings*. The evidence showed that the defendant submitted to a breathalyzer test. The defendant contends that the judge erred in admitting the results of the breathalyzer test where testimony of police witnesses showed that the test was not properly administered. These witnesses, however, testified that although the procedure followed was not ideal, it was adequate , and that they believed that the test results were accurate. The defendant's contention goes to the weight of the evidence, not its admissibility. This issue was for the jury, and it was not error to submit it to them.

The defendant further contends that the trial judge erred in requiring the defendant to answer on cross-examination that he was informed that he would lose his driver's license for ninety days if he refused to take a police-administered breathalyzer test. He argues that this evidence was irrelevant

[2]The defendant's motion for jury questions focused on the statutory provisions that inquiry must be made as to the concepts that a defendant is presumed innocent until proven guilty, that the Commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the defendant need not present evidence in his behalf. G. L. c. 234, § 28.

to any issue in the case, or, if relevant, should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice to the defendant.[3] In the defendant's view, allowing the prosecution to inquire into this matter created an untenable dilemma for a motorist arrested for driving under the influence. If he refuses the test, he loses his license for 120 days (ninety days, at the time the defendant was arrested), G. L. c. 90, § 24 (1) (*f*) (1986 ed.). If he consents to the test, he is subject to the suggestion at trial that he took the test not because of his consciousness of innocence but rather because of the threatened loss of license. The evidence was relevant to show that the defendant's willingness to take the breathalyzer test was not due to his consciousness of innocence. The judge in his discretion was warranted in concluding that the probative value of the inquiry was not substantially outweighed by the danger of prejudice to the defendant.[4] Fairness undoubtedly will be promoted in such cases if the aspect of "voluntariness" does not arise in the evidence at all, by preliminary direction of the judge, upon motion of any party.

Judgment affirmed.

Order of the single justice affirmed.

[3] Evidence that the defendant had declined to take a breathalyzer test would not be admissible. G. L. c. 90, § 24 (*e*) (1986 ed).

[4] In his opening statement, defense counsel made reference to the fact that the defendant had "voluntarily submitted" to the test. The defendant testified that he was not intoxicated on the night of the arrest; that he "couldn't believe" that he had been stopped for driving under the influence; and that he was informed of the right to take the test, and "so I decided to take it." The judge could reasonably conclude that an inference of the defendant's consciousness of innocence could have been drawn by the jury. Cf. *Commonwealth* v. *Preziosi*, 399 Mass. 748, 752-753 (1987) (no impropriety in prosecutor's suggestion that the jury draw inferences contrary to defense counsel's argument that they could infer the defendant's consciousness of innocence from his cooperation with the police).

Appendix B.

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To: Chief Justice Edward F. Hennessey
Supreme Judicial Court

Re: Commonwealth v. Thomas K. Yameen
No. 4424

PETITION FOR REHEARING

It is respectfully requested that the Supreme Judicial Court grant a rehearing in the above-entitled case for the following reasons:

I. G.L. CH. 234, SEC. 28

A. *The Court Misinterpreted the Legislative Intent Underlying the 1985 Amendment to G.L. Ch. 234, Sec. 28*

In Section 2 of its opinion, the Court held that "[t]he short answer to [defendant's contention that the amendment required an explanation of the legal concepts contained therein] is that the Legislature did not mandate that such explication must occur as part of the empanelling process."

The critical language of the amendment, which the Court failed to set forth in its opinion, is: "such examination *shall include questions designed to learn whether such juror understands* . . ." (emphasis added). This language plainly directs

trial judges to probe jurors as to their understanding and requires far more than merely rote recitation of concepts set out in the statute. The legislative intent, which the Court's decision missed, is set out by Representative Richard J. Rouse, the bill's sponsor, in a letter included herein as "Attachment A." This Court should consider its contents in deciding this Petition. If the legislative intent is not clear from a fair reading of the statutory language, then Representative Rouse's letter should make it so; hence, the legislature did, in fact, mandate that an "explication" of these legal concepts be given by trial judges, who should have flexibility in "designing" appropriate questions.

B. *Constitutionality of G.L. Ch. 234, Sec. 28, Par. 1*

In a case decided a week before the decision in this case, this Court suggested that G.L. Ch. 234, Sec. 28, par. 1, may violate Article 30 of the Declaration of Rights of the Massachusetts Constitution. *Commonwealth* v. *Mickel*, 401 Mass. 1003, 1005, n. 2.

If the Court is now uncertain or seriously questions the constitutionality of the statute, the administration of justice would be advanced if this Court would rehear the case and permit the parties to brief and reargue the constitutionality of the 1985 amendment.

II. It Was Fundamentally Unfair to Admit Evidence of Consequences Defendant Would Have Suffered Had He Refused the Breath Test in a Case Where He, in Fact, Took the Test

A. *Defendant's Alleged "Consciousness of Innocence"*

At trial, defense counsel objected to the prosecutor's question to the defendant as to whether he was informed, at the po-

lice station, that he would lose his license for 90 days if he refused the breath test. Without citing any direct authority, this Court held the question and answer to be relevant. The Court reasoned that the evidence was admissible to rebut an inference of "consciousness of innocence" which the Court unfairly attributed to the defendant having injected into the trial. In finding such inference, however, the Court has overlooked important facts. In Footnote 4 of the opinion,[1] the Court lists four factors which apparently are felt to be important ones suggesting "consciousness of innocence." They are: 1) defense counsel's reference, in his opening, to the fact that the defendant "voluntarily submitted" to the breath test; 2) defendant's testimony that he was not intoxicated; 3) defendant's statement that he "couldn't believe" that he had been stopped for driving under the influence; and 4) defendant's statement: "so, I decided to take it" after being informed of his right to take the test.

As to No. 1, the Court creates the false impression that defense counsel opened the door to such rebuttal evidence by having referred to defendant "voluntarily submitting" to the test. In fact, counsel was merely anticipating the judge's use of the same phrase in Instruction 4.10 of the *Model Jury Instructions for Criminal Offenses Tried in the District Court Department* ("Attachment B"). The judge, as expected, gave that instruction, including the language: "Now, Chapter 9 (*sic*), Section 24 of our laws provides that a defendant may *voluntarily submit* to a breath test . . ." (Tr. III/48 and D.Brief at 21).

It would be extremely unfair to penalize defendant for anticipating use of a model jury instruction in existence for many years and used on a daily basis in jury of six sessions throughout the Commonwealth. This Court's opinion now calls into question future use by trial judges of that instruction. It was entirely

[1] Taken virtually verbatim from the Commonwealth's Brief (Page 39, lines 13-19).

proper for counsel to rely, in his remarks to the jury, on the law that he anticipated the judge would give in his charge. Cf. Mass.R.Crim.P. 24(b). "The purpose of the rule is to enable counsel to argue intelligently to the jury." *Commonwealth* v. *Thomas*, 21 Mass.App.Ct. 183, 186-187, 486 N.E.2d 66 (1985). Defense counsel did not, therefore, open the door by using the words "voluntarily submitted," and this Court erred when it so implied.

As to No. 2, it goes without saying that this, or any, defendant would likely deny his intoxication when he takes the witness stand. Characterizing denial testimony as "consciousness of innocence" so broadens this concept as to make it meaningless.

As to No. 3, the Court misstates the evidence where it credits the defendant with having said that he "couldn't believe" that he had been stopped for driving under the influence. What defendant actually said was that, at the scene of the stop, "I was nervous, the lights, and everything, and I couldn't believe what was happening there." (Tr. II/111). Later, when he refused to be bailed from a cold jail cell at the urging of Lt. Lynch, he said: "And then, I sat there, and I just couldn't believe what happened." (Tr. II/118). These are perfectly understandable and expected reactions from a motorist who had never been arrested before. (Tr. II/112). To also characterize this as evidence of "consciousness of innocence" impinges on a defendant's right to testify on his own behalf.

In No. 4, the Court mistakenly penalizes defendant for introducing evidence that had first come in through the Commonwealth. Defendant testified that he "decided to take it [the test]." The almost identical description had earlier been given by Lt. Lynch when being questioned by the prosecutor on direct examination:

> Q. Did Mr. Yameen elect to exercise any of the rights you advised him of?

A. Yes, he did.
Q. Which right was that?
A. *He elected to take the intoxilyzer.* (Tr. II/55).

B. *The Court's Analysis and Holding Denies Defendant Due Process under the Fourteenth Amendment*

In Massachusetts a motorist has a right to consent to a breath test. *Commonwealth* v. *Alano*, 388 Mass. 871, 874, 448 N.E.2d 1122 (1983). In this case the defendant, in the words of the breathalyzer operator, "elected" to exercise that right (Tr. II/55). Had the defendant declined the test he would have lost his driver's license for 90 days. G.L. Ch. 90, Sec. 24(1)(f). That penalty is unquestionably legitimate. *Mackey* v. *Montrym*, 443 U.S. 1, 99 S.Ct. 2612 (1979). Clearly the Commonwealth wants a motorist to take the test because then it will have the benefit of the statutory presumption under G.L. Ch. 90, Sec. 24(1)(e) should the reading be .10 or greater. See *Commonwealth* v. *Moreira*, 385 Mass. 792, 434 N.E.2d 196 (1982).

Once a motorist has made the choice the Commonwealth wants him to make, it is fundamentally unfair and a denial of due process to then penalize him at trial for that choice. See *Doyle* v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). Even in states that, unlike Massachusetts, allow a motorist's refusal to take the test to be used in evidence against him, the state "wants [the motorist] to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." *South Dakota* v. *Neville*, 459 U.S. 553, 563-564, 103 S.Ct. 916 (1983). The Commonwealth in this case got the inference they were seeking because the defendant's test reading was .16.

The Court's logic and holding in the case at bar transformed a state evidentiary question into a constitutional issue. See

Commonwealth v. *Trapp*, 396 Mass. 202, 207, n. 4, 485 N.E.2d 162 (1985).

In *Doyle*, a defendant was given *Miranda* warnings after his arrest and elected to remain silent. At trial the prosecutor, who was confronted with an exculpatory explanation by defendant, cross-examined him as to his failure to tell his story to the police at the time of his arrest. The court stated that:

> In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. *Doyle*, *supra*, at 618.

As in *Doyle*, Yameen was offered a lawful choice; his choice to take the breath test was equivalent to Doyle's choice to remain silent; and that choice had the effect, whether it was intended or not, of avoiding a loss of license. The Supreme Court, in subsequent cases, has "consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher* v. *Weir*, 455 U.S. 603, 606, 102 S.Ct. 1309 (1982). In explaining to the Massachusetts motorist his two options, the government has implicitly assured the motorist who takes the breath test that his avoidance of license loss will likewise not be used against him.

To paraphrase Justice White in his concurring opinion in *United States* v. *Hale*, 422 U.S. 171, 182-183, 95 S.Ct. 2133 (1975), cited in *Doyle*, *supra*, at 619:

> when a person under arrest is informed, as [Chapter 90] requires, that he [has a right to consent to a breath test and will lose his license for 90 days if he does not], it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to

> [the defendant's avoidance of the penalty for refusing the test] and to insist that because he [chose to take the test], as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony . . . Surely [Yameen] was not informed here that his [avoidance of license loss] as well as his [test result], could be used against him at trial. Indeed, anyone would reasonably conclude from [what he was told] that this would not be the case.

See also *Brooks* v. *Tennessee*, 406 U.S. 605, 607-613, 92 S.Ct. 1891 (1972) (statutory requirement that a defendant desiring to testify must do so before any other witness for the defense constituted "an impermissible restriction on the defendant's right against self-incrimination"). *Id.* at 609; *Griffin* v. *California*, 380 U.S. 609, 614, 85 S.Ct. 1229 (1965) (viewing prosecutor's argument on defendant's failure to testify as constituting "a penalty imposed . . . for exercising a constitutional privilege").

The fallacy in the Court's reasoning in the instant case becomes obvious when one realizes that it applies only to incriminating breath test results, i.e. .10 or greater. (Readings less than .10 would themselves be "consciousness of innocence" and make refusal evidence undisputably irrelevant).

Not only does this reasoning *create* the constitutional violation, it renders it more egregious than in *Doyle*, because unlike Doyle, Yameen made the choice the government wanted him to make, providing them with inculpatory evidence.

A rehearing on this issue, in view of the erroneous foundation upon which the Court's decision is based, is appropriate. Any deprivation of a federal constitutional right necessarily invokes the cognate provisions of the Declaration of Rights of the Massachusetts Constitution. *Commonwealth* v. *McGeoghegan*, 389 Mass. 137, 141, n. 2, 449 N.E.2d 349 (1983). The Court, therefore, should first address the issue under the state

constitution and if that is not dispositive, it should then consider the issue under the federal constitution. Failure to do both may "unnecessarily invite" the United States Supreme Court to undertake a review of this judgment. See *Massachusetts* v. *Upton*, 466 U.S. 727, 737, 104 S.Ct. 2085 (1984) (Stevens, J. concurring) ("The States in our federal system . . . remain the primary guardian of the liberty of the people.") *Id.* at 739.

III. Requested Corrections to the Opinion.

The defendant requests that the Court make the following corrections to the opinion:

A. Footnote 1 incorrectly states that the conviction for failure to use care when turning was not appealed. That conviction was, in fact, appealed as is indicated by docket numbers appearing on the Notice of Appeal. R. 8. Although a minor motor vehicle offense, that conviction would also have been reversed had the defendant prevailed on the Ch. 234, Sec. 28 issue. Footnote 1 unfairly suggests inattention by defense counsel and perhaps negligence in failing to include that conviction in the appeal. For these reasons the footnote should be deleted.

B. In Footnote 4, the Court leaves the clear impression that the words "voluntarily submitted" were the invention of defense counsel and that he opened the door to his client's demise. As noted above at II A., that phrase appears in Instruction 4.10 of the *District Court Model Jury Instructions* and was used by the judge in his charge. The Court should also note this fact in the opinion.

For all the foregoing reasons, it is respectfully requested that the Court grant the Petition.

Respectfully submitted,

THOMAS K. YAMEEN
By his attorney,
/s/
Bruce T. Macdonald
678 Massachusetts Avenue
Suite 901
Cambridge, MA 02139
354-1711

January 13, 1988

THE COMMONWEALTH OF MASSACHUSETTS

HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133

RICHARD J. ROUSE
Assistant Majority Leader
5th Suffolk District
Boston

Room 445
Tel. 722-2460

January 8, 1988

Bruce T. Macdonald
Attorney At Law
678 Massachusetts Avenue
Suite 901
Cambridge, Massachusetts 02139

Dear Mr. Macdonald:

In response to your concerns as to the Supreme Judicial Court's decision in *Commonwealth* v. *Thomas K. Yameen,* I have reviewed that decision as it relates to the 1985 amendment to G.L. Ch. 234, Sec. 28, an amendment which I sponsored.

As you know, and as I understand the Court was made aware through your brief, the original bill (H. 1590) contained two questions which were to be posed verbatim to prospective jurors. As the bill progresses through the Judiciary Committee, it was modified because of the feeling among the legislators that the underlying legal concepts needed to be explained to prospective jurors during the empanelling process. It was for this reason that the language "such examination *shall include questions designed to learn* whether such juror understands that . . ." was included in the final draft of the bill. (emphasis added).

Attachment A

The intent of the bill, as enacted, was to allow trial judges flexibility in "designing" appropriate questions to explain these concepts. It was not intended that they merely quote the words of the amendment, i.e. "that a defendant is presumed innocent until proven guilty, that the commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the defendant need not present evidence in his behalf." Your assertion to the Supreme Judicial Court that the term "reasonable doubt" should have been defined in some way, correctly perceives the intent of this legislation.

Support for this bill stemmed from the result of a survey conducted by the Hearst Corporation entitled **The American Public, The Media and the Judicial System** . . . . which found that:

> 1) 50% of the American public mistakenly believe it is the responsibility of the person who is accused of a crime to prove his or her innocence.
>
> 2) Almost half of all the respondents who have served on a jury also mistakenly believe the accused person must prove his or her own innocence and 31% of all college graduates hold the same erroneous opinion.
>
> 3) 54% of the public say they frequently get their information from TV news.
>
> 4) The most common reason for Americans to have gone to court — an experience shared by 20% of the public — is a civil case, typically, a divorce, a child-support or a breach of contract action.
>
> 5) More than half of the American public (63%) believe it would be good public policy to "step up" punishment for victimless crimes such as possession of small amounts of illegal drugs, illegal sex between consenting adults and certain juvenile offenses such as school truancy, breaking curfew and drinking.

I understand that you will be attaching this letter to your Petition for Rehearing in your case. If I can be of any further assistance to you, please feel free to contact me.

Sincerely yours,

RICHARD J. ROUSE
State Representative

RJR/sjb

Instruction 4.10
Revised December, 1983

BLOOD OR BREATH ANALYSIS

G.L. c. 90 s. 24 provides that a defendant may voluntarily submit to a [breath] [blood] test to assist in determining whether at a time the defendant was under the influence of intoxicating liquor. Evidence has been presented that the defendant submitted to such a test. In pertinent part, G.L. c. 90, s. 24(1)(e) provides:

> In any prosecution for a violation of paragraph (a) of this subdivision [which pertains to the charge of operating under the influence of intoxicating liquor], evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; . . . . If such evidence is that such percentage was five one-hundredths or less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor . . . if such evidence is that such percentage was more than five one-hundredths but less than ten one-hundredths, there shall be no presumption; and if such evidence is that such percentage was ten one hundredths or more . . . .

you may draw an inference that such defendant was under the influence of intoxicating liquor.

Attachment B

If you are convinced beyond a reasonable doubt that the test administered to the defendant is scientifically accurate and was properly and competently administered, then you *may consider the test results in determining the defendant's guilt or innocence*. If you believe the test is inaccurate, either because it is scientifically invalid or was not properly or competently administered, then you should disregard the test and find the defendant innocent or guilty based on other evidence presented in this case.

[See Instructions on Presumption and Inference]

NOTE

The underlined portions of this charge indicate the revisions made as a result of the language of the Supreme Judicial Court in *Comm. v. Moreira,* 385 Mass. 792, 797, 434 N.E.2d 196, 200 (1982), which directed that trial judges "avoid the use of the word 'presumption,' in any context which includes the burden of proof in criminal cases."

The term "prima facie evidence" may be substituted for the reference to "inference." See *Comm. v. Brooks,* 366 Mass. 423, 424-425 n. 2, 319 N.E.2d 901, 903 n. 2 (1974), which reads: "Although G.L. c. 90, sec. 24(1)(e), speaks in terms of presumptions, our decisions in other areas suggest that proof of a defendant's blood alcohol concentration might be better termed prima facie evidence. While this distinction is technical, and frequently emphemeral, it does have some practical effects . . . ."

By its terms, the statute does not confer a right to a chemical test, such as a breathalyzer, on one charged with the offense of driving under the influence. The statute does no more than regulate the admissibility, and establish the effect of chemical tests of blood alcohol content. It does not establish a right to a police administered test. A defendant is not entitled, under

the State or Federal Constitution, to have a charge against him dismissed because the police department did not give him a blood alcohol test upon his request unless there is a showing of bad faith on the part of the police. *Comm. v. Alano*, 388 Mass. 871, 448 N.E.2d 1122 (1983).

Appendix C.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS 02108
(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

January 25, 1988

Bruce T. MacDonald, Esq.
678 Massachusetts Avenue - Suite 901
Cambridge, MA 02139

Dear Mr. MacDonald:

Re: **Commonwealth** vs. **Thomas K. Yameen**
Supreme Judicial Court No.-SJC-4424

Your Petition for Rehearing in the above captioned appeal has been considered by the court and is denied.

Very truly yours,
/s/
Dolores G. Dupré
for Jean M. Kennett, Clerk

c.c.: David Grossbaum, A. D. A.
Essex County D.A.'s Office
70 Washington Street
Salem, MA 01970

PLEASE ADDRESS ALL CORRESPONDENCE TO CLERK

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. 4424

COMMONWEALTH

vs.

THOMAS K. YAMEEN

Request for Certificate that Federal Question was Raised and Decided

The defendant in the above-entitled matter respectfully requests that this Honorable Court certify to the United States Supreme Court that, in denying defendant's Petition for Rehearing, the federal question raised therein was considered and passed upon by the Court. *Whitney v. California*, 274 U.S. 357, 361 (1927); *Honeyman v. Hanan*, 300 U.S. 14, 22 (1937); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 22 (1974); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 3.23 (6th ed. 1986).

The defendant further requests that the form of such certificate include a statement that: "In his Petition for Rehearing the defendant asserted and argued that it was fundamentally unfair and a denial of due process under the Fourteenth Amendment to the United States Constitution to admit evidence of the consequences defendant would have suffered had he refused the breath test, when he in fact took the test; that the Court considered the question of a federal constitutional violation; that it was the judgment of the Court that there was no such violation; that it was necessary to the Court's denial of the Petition for Rehearing to determine said federal question; and

that such question was determined adversely to the defendant." See *Allenberg Cotton Co. v. Pittman*, 419 U.S. at 22.

Dated: January 29, 1988

By his attorney,
/s/
Bruce T. Macdonald
678 Massachusetts Avenue
Suite 901
Cambridge, MA 02139
354-1711

Appendix E.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS 02108
(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

February 23, 1988

Bruce T. MacDonald, Esquire
678 Massachusetts Avenue
Suite 901
Cambridge, Massachusetts 02139

RE: COMMONWEALTH vs. THOMAS K. YAMEEN
SJC-4424

Dear Mr. MacDonald:

Enclosed herewith is the Clerk's certificate which you recently requested in your motion of January 29, 1988.

Very truly yours,
/s/
Jean M. Kennett
Clerk

JMK/dmd

PLEASE ADDRESS ALL CORRESPONDENCE TO CLERK

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Supreme Judicial Court
for the Commonwealth

I, Jean M. Kennett, Clerk of said Court, hereby certify that:

In his Petition for Rehearing in the case of Commonwealth v. Thomas K. Yameen, SJC — 4424, which was denied by the Court, the defendant asserted and argued that it was fundamentally unfair and a denial of due process under the Fourteenth Amendment to the United States Constitution to admit evidence of the consequences defendant would have suffered had he refused the breath test, when he in fact took the test.

However, the Court further states that the federal question was *not* adequately raised in briefs or arguments on appeal, and was *not* considered by the Court in its denial of the defendant's Petition for Rehearing.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-second day of February in the year of our Lord one thousand nine hundred and eighty-eight.

/s/Jean M. Kennett, Clerk.